88-1427

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Petitioners,

v.

FRANK MEAGHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in creating a "continuing violation" theory of ERISA benefit claims by ruling that a separate and independent cause of action for employee benefits accrues, and a plaintiff's limitations period again begins running, each time an allegedly inadequate periodic benefit check is issued.

2. Whether the Ninth Circuit erred by ruling that the statute of limitations applicable to actions for recovery of employee benefits under ERISA Section 502(a)(1)(B) is the three year/six year period that ERISA Section 413 prescribes for suits alleging breach of fiduciary duty rather than an analogous state limitations period.

LIST OF PARTIES

The parties to the proceedings below were the petitioners, The International Association of Machinists and Aerospace Workers Pension Plan, William Winpisinger, Eugene Glover and George Kourpias as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan, and the respondent, Frank Meagher.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The opinion of the United States Courts of Appeal for the Ninth Circuit is reported at 856 F.2d 1418. The opinion and judgment of the District Court for the Northern District of California is unreported. Both opinions, as well as the appellate court's unreported denial of rehearing, are reproduced in the Appendix.

JURISDICTION

The opinion of the Court of Appeals was entered on September 12, 1988. A timely petition for rehearing with suggestion for rehearing *en banc* was denied by the Ninth Circuit on December 1, 1988. This petition for writ of certiorari was filed within 90 days of the lower

court's denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, et seq., are pertinent to this matter:

ERISA Section 204(g), 29 U.S.C. § 1054(g);
ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8);
ERISA Section 413, 29 U.S.C. § 1113;
ERISA Section 502(a), 29 U.S.C. § 1132(a)

The texts of these provisions are set forth in the statutory appendix bound with this petition. Pp. 24a-26a.

STATEMENT OF THE CASE

1. The Factual Background [1]

This action was brought by Respondent Frank Meagher (hereafter "Meagher") in the United States District Court for the Northern District of California pursuant to the Employee Retirement Income Security Act of 1974, as amended (hereafter "ERISA"). Meagher, a former General Vice-President of the International Association of Machinists and Aerospace Workers and member of its Executive Council, is a retiree under the IAM Pension Plan. He retired on July 1, 1977 and has been receiving benefits since that date.

Meagher's complaint sought payment of additional pension benefits by challenging the lawfulness of an amendment made to the IAM Pension Plan more than nine years earlier. The challenged amendment, which was adopted in September 1976, phased out, and ultimately eliminated, a post-retirement benefit adjustment mecha-

[1] The facts set out herein are derived from the Plan's motion for summary judgment (dated April 23, 1987) and supporting affidavits of Eugene Glover. Except where noted, none of the facts are disputed.

nism that previously had been a part of the Plan. By its terms, the amendment became effective on January 1, 1977. The complaint was not filed, however, until May 13, 1986.

Petitioner International Association of Machinists and Aerospace Workers Pension Plan (hereafter the "Pension Plan" or "Plan") is a defined benefit pension plan sponsored by the International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter the "Union" or "Grand Lodge"). The Plan's participants are the officers and support staff who work for the Grand Lodge and its subordinate local and regional affiliates. Petitioners William Winpisinger, Eugene Glover and George Kourpias are the Plan's Trustees. The Plan is funded entirely by employer contributions. It maintains its sole offices, its records and accounts, and is administered in Washington, D.C.

The current Plan was created in 1980 as the result of a merger of three predecessor staff plans (frequently hereafter referred to as the "predecessor plans" or "staff plans"). The predecessor plans were established in 1940, 1952 and 1960, respectively. All plans were established pursuant to the IAM International Constitution. The Plan is, and has always been, an integral part of the Union Constitution.

Over the years, amendments to the Plan, including the one challenged in this action by Meagher, have been accomplished through the medium of amendments to the International Constitution. Such amendments are adopted by delegates to the Union's International Conventions and are binding upon the Plan's trustees.

Until 1976, the three staff pension plans shared many common features. One of these was a benefit formula which tied a participant's monthly retirement benefit to his salary at the time of his retirement. Another was a post-retirement benefit adjustment mechanism. Under

that mechanism, a retiree's monthly benefit would be adjusted upward in the same proportion as any increase in the salary level of the Union position from which he retired. This latter aspect of the plans' benefit program was commonly known as the "living pension" feature.

As a result of sharply increased inflation rates in the late 1960's and early 1970's, the cost of maintaining the staff plans increased dramatically. Between 1967 and 1975, the total unfunded liabilities of the staff plans increased from $12,800,000 to $77,100,000. So catastrophic was the plans' experience that their actuaries advised the Union to take remedial action. If corrective measures were not taken, they warned, the plans' costs would escalate to between 30 and 40 percent of total salary or more. Such a high level of contributions would severely hamper the Union's ability to service its members by decreasing the amount of revenue available for organizing, negotiating, and other basic union activities. One of the principal remedies proposed by the actuaries for the plans' financial plight was that the inflation driven "living pension" feature be phased out and eventually eliminated.

The Union's Executive Council, of which Meagher was an active member, considered the actuaries' recommendations during 1975 and 1976 and, notwithstanding the fact that they affected each Council member adversely, subsequently endorsed them. In turn, the Council submitted the suggested amendments to the delegates to the Union's September 1976 International Convention. The delegates, many of whom also would be adversely affected by the amendment, voted overwhelmingly in its favor.[2]

Meagher was present at all of the Executive Council meetings at which the phase out proposal and amendment was discussed. He was, moreover, present at the 1976

[2] The amendment progressively reduced the amount of the "living pension" adjustments starting January 1, 1979. After 1984, no further adjustments were to be made.

Convention that formally adopted the amendment. Indeed, he actively lobbied for support of the amendment among the delegates from the region which he serviced as General Vice-President.[3]

The amendment phasing out the "living pension" feature, by its terms, became effective on January 1, 1977. In the spring of 1977, copies of the revised Union Constitution (which indicated the changes to the plans) were distributed to all Union officers, including Meagher.[4]

Meagher retired on July 1, 1977 and was granted a pension benefit in accordance with the terms of the staff plan applicable to him, as amended. His monthly benefit presently is $2,698.

On January 1, 1979, the date on which the phase out amendment first was implemented, a letter was sent to all retirees, including Meagher, explaining how the amendment affected them specifically. On October 10, 1979, complete summary plan descriptions, as required by ERISA's newly effective disclosure requirements, were sent to all participants and retirees, including Meagher. The latter documents also described in detail how the post-retirement adjustments would be phased out and eliminated.

2. The Shaw Litigation

The amendment eliminating the "living pension" adjustments made no distinction between persons who had

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[3] Affidavit of Glover dated April 16, 1987, para. 21. Meagher stated that he had opposed the amendment and denied his lobbying activities on its behalf. Affidavit of Meagher dated May 4, 1987, paras. 2-4.

[4] On May 16, 1977, copies of the texts of the three predecessor plans, including the provisions for the phase out of the "living pension" feature were submitted to the Internal Revenue Service. Notice of such filing was sent to all plan participants. On February 10, 1978, the IRS issued a favorable determination letter with respect to each plan.

retired before its January 1, 1977 effective date and those who would retire subsequently. One of the pre-1977 retirees was a former District Lodge business representative named Edward Shaw.

On December 1, 1981, Shaw, acting for himself and a class of other pre-1977 retirees, brought suit against the Plan and its Trustees alleging, *inter alia*, that the amendment eliminating the "living pension" feature was a violation of Section 204(g) of ERISA, 29 U.S.C. § 1054(g). That provision prohibits plan amendments which reduce "accrued benefits" unless the amendment is approved by the Secretary of the Treasury pursuant to the terms of ERISA Section 302 (c)(8), 29 U.S.C. § 1082(c)(8).[5]

On the basis of cross motions for summary judgment, the District Court ruled in favor of Shaw, finding that the "living pension" benefit adjustments were "accrued benefits" within the meaning of the Act and that the phase out amendment improperly reduced those benefits. *Shaw v. IAM Pension Plan*, 563 F. Supp. 653 (C.D. CA 1983). Accordingly, it entered a judgment reinstating all 'living pension" adjustments to Shaw "and to all other retirees, like plaintiff, who had retired prior to January 1, 1977." Judgment, *Shaw v. IAM Pension Plan*, CV 81-6076 (AAH) (dated July 15, 1983), p. 2. This judgment was affirmed by the Ninth Circuit in a decision reported at 750 F.2d 1458.[6]

3. The Proceedings Below

a. *The Complaint*

The complaint in this matter was filed on May 13, 1986. Jurisdiction was alleged to be pursuant to ERISA

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[5] Sections 204(g) and 302(c)(8) are reproduced at pages 24a-25a, *infra*. The statutory language places the responsibility of reviewing plan amendments with the Secretary of Labor. This duty was transferred, however, to the Secretary of Treasury.

[6] Certiorari was denied by this Court at 471 U.S. 1137 (1984). The Plan subsequently complied fully with the District Court's judgment.

Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which authorizes suits to "recover benefits due . . . under the terms of . . . [a] plan."[7] In the alternative, relief was sought pursuant to Section 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B), which, *inter alia*, permits suits for equitable enforcement of plan provisions.

Although he retired after January 1, 1977, Meagher alleged that there was no meaningful difference between his position and that of Shaw and the other pre-1977 retirees and that the phaseout amendment was one which also reduced his "accrued benefits" in violation of ERISA Section 204(g). Complaint, para. 9. Meagher further alleged that the Trustees, by "adopting" the amendment, breached their fiduciary obligation to manage the Plan for the exclusive benefit of the participants and beneficiaries and therefore acted arbitrarily and capriciously. Complaint, para, 10.

The Plan's answer denied that the amendment, as applied to Meagher, violated ERISA. In addition, the Plan asserted as affirmative defenses that: (a) Meagher's action was barred by the applicable statute of limitations; (b) he is equitably estopped from bringing his action because he supported, endorsed, and approved the phase out amendment in his capacity as a General Vice-President of the Union and a member of its Executive Council; and (c) he failed to exhaust available internal union remedies.[8]

Because no material facts relevant to their statute of limitations defense were in dispute, the Plan moved, on April 24, 1987, for summary judgment on the ground that the applicable statute of limitations had expired and the complaint was therefore time barred.

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[7] The text of Section 502(a)(1)(B) is set out at page 25a, *infra*.

[8] The Trustees urged too that, with respect to Meagher, there was no reduction of "accrued benefits" within the technical meaning of that statutory term.

Meagher opposed the motion and moved for summary judgment in his favor on the merits. The Plan opposed Meagher's cross motion, *inter alia*, on the ground that there were material questions of fact in dispute relevant to the Plan's affirmative defense of estoppel.

b. *The Order of the District Court*

On May 22, 1987, the United States District Court for the Northern District of California (by the Honorable Samuel J. Conti) granted the Plan's motion for summary judgment and dismissed the complaint as untimely. Appendix, pp. 15a-18a.

Although the essence of Meagher's complaint was an action to obtain benefits pursuant to the terms of a plan,[9] the Court ruled that the statute of limitations applicable to Meagher's claim is that contained in ERISA Section 413, 29 U.S.C. § 1113, which requires that actions seeking redress for alleged breaches of fiduciary duty be brought within the earlier of six years of the occurrence of the claimed breach or three years of the date on which plaintiff obtains knowledge of such breach. Appendix, p. 16a. The Court essentially ignored the Plan's position that the limitations period applicable to claims for empolyee benefits pursuant to ERISA Section 502(a)(1)(B) is the three year one provided by District of Columbia law for actions to enforce written contracts.[10]

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[9] Meagher's complaint also alleged that the Trustees had breached their fiduciary duty to him by "adopting" the phase out amendment. However, the District Court in *Shaw* had previously ruled that the Plan's Trustees had no authority with respect to Plan amendments and that: "Absent such authority, it cannot be said that the defendants/trustees breached any duty owed to plaintiffs." 563 F. Supp. 653, 658. Meagher himself subsequently conceded that the amendment was imposed upon the plan by the delegates to Union's 1976 International Convention and the Trustees therefore bore no fiduciary responsibility for that action. Answering Brief of Appellant (dated September 21, 1977), p. 5.

[10] D.C. Code Ann. § 12-301(8). The Plan's position as to the applicable limitations provision was set out at pages 14-17 of its

On the basis of the undisputed facts, the Court then ruled that Meagher, as a member of the Union's Executive Council and General Vice-President was, in the Spring of 1977, fully aware of the plan amendment phasing out his post retirement benefit adjustments. It further found that, in any event:

> . . . the statute of limitations began to run at the latest in mid-October 1979, when plaintiff received a letter from the Union explaining that it was phasing out the living pension. At that time, Meagher had knowledge of the events which gave rise to his cause of action.

Appendix, pp. 17a-18a.

Applying, apparently to give Meagher the benefit of all doubt, the maximum six year limitations period provided by Section 413 (rather than its three year period), the Court concluded that Meagher's limitation period expired by October 1985, one year before the filing of the instant action, and dismissed the complaint.[11]

Meagher timely appealed from the District Court's order to the United States Court of Appeals for the Ninth Circuit.

c. *The Decision of the Ninth Circuit*

In an opinion dated September 12, 1988, the Ninth Circuit reversed the judgment of the District Court. Ap-

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Memorandum of Law in Support of its Motion for Summary Judgment (dated April 24, 1987). See pp. 23a-25a, *infra*.

[11] The court, in addition, rejected the contention made by Meagher that his limitation period was tolled until he first learned in 1985 of the outcome of the *Shaw* case. Citing the Ninth Circuit's ruling in *Blanton v. Anzalone*, 760 F.2d 898, 998 (9th Cir. 1985), as controlling authority (which itself was founded on the decision of this Court in *United States v. Kubrick*, 444 U.S. 111 (1979)), the District Court ruled that Meagher's cause of action accrued, and his limitations period therefore commenced running, when he had "knowledge of the transaction that constitutes the underlying violation". It was, accordingly, irrelevant when, or whether, Meagher learned of the *Shaw* case and the legal reasoning underlying it.

pendix, pp. 1a-11a. Although the question was neither raised by the appeal before it nor briefed by the parties, the Court nevertheless declared that its earlier decision in *Shaw* was equally applicable to persons, such as Meagher, who retired subsequent to the adoption of the amendment phasing out the "living pension" feature.[12] It agreed with the District Court that the applicable limitations period was the three year/six year period prescribed in ERISA Section 413 but determined that Meagher's complaint was not time barred. The basis for the latter ruling was a novel, and *sua sponte*,[13] approach to the question of when a cause of action for employee benefits accrues and the applicable limitations period therefore begins running.

Rather than looking to the point at which Meagher learned that there had been a change in the Plan that adversely affected his benefits, the Ninth Circuit focused instead on when he felt the effects of the amendment. The Court regarded each benefit check issued in an amount less than that to which Meagher claimed entitlement as giving rise to an independent cause of action. The Court did not see the issuance of reduced benefit checks as being merely a ministerial consequence of action taken much earlier (*i.e.*, the adoption of, and announced intention to apply, a plan amendment). It concluded instead that each issuance was a separate violation of the lawful terms of the Plan giving rise to a new

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[12] As noted previously (p. 6, *supra*), the judgment of the district court in *Shaw* was limited to persons who had retired prior to the effective date of the phase out amendment.

[13] At no stage of the proceedings had Meagher ever urged that each monthly payment to him constituted a separate cause of action. His response to the Trustees contention that his limitation period had run was an assertion that the statute had been tolled until he learned of the 1986 ruling in *Shaw*. Brief of Appellees, pp. 13-18.

cause of action under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).[14]

> This is a denial of benefits to which Meagher was, and will become, entitled and with respect to which he seeks "to recover . . . [and] to enforce his rights under the terms of the plan . . ." 29 U.S.C. § 1132 (a)(1)(B). Each check issued to him in an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA, as required by 29 U.S.C. § 1104(a)(1)(D). A separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action.

Appendix, p. 9a. Meagher's action, accordingly, was considered timely with respect to benefits allegedly underpaid during the three years preceding the filing of his complaint.

On December 1, 1988, the Ninth Circuit denied the Plan's petition for rehearing with suggestion for *en banc* review. Appendix, pp. 12a-13a.

REASONS FOR GRANTING THE WRIT

By its *sua sponte* ruling that a cause of action seeking employee benefits pursuant to ERISA accrues each time a benefit check is issued that fails to include the full amount claimed to be due, the Ninth Circuit effectively has eliminated as a defense against such claims the running of the statute of limitations. By so ruling, the Court has spurned the fundamental concept of American jurisprudence that a plaintiff be diligent in the prosecution of a complaint or face the consequence of a time bar.

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[14] The Court regarded the phase-out amendment as "inoperative" and therefore not a lawful plan term.

The Ninth Circuit's ruling in this matter is in conflict with the rulings of other Circuits in two important respects. First, the decision below departs from those of other circuits on the issue of when an ERISA cause of action accrues. Second, it conflicts with the decisions of other circuits on the question of which statute of limitations is appropriately applied in ERISA founded benefit claims. The ruling also conflicts with the principles established by this Court, as well as other Circuits, as to when causes of action accrue under employee protective statutes generally.

The consequences of the lower court's ruling to the administration of the hundreds of thousands of employee benefit plans throughout the United States are extremely serious. Unless the decision is reversed, employee benefit plan trustees and administrators never again will be able to act with the necessary certainty that decisions affecting benefits will at some point cease being subject to challenge. This is so because, under the lower court's rationale, virtually any claim of inadequate benefit payment can be characterized as a separate "improper application" of the lawful terms of an employee benefit plan. Accordingly, plan design choices made in good faith could be the subject of expensive litigation decades after they were made. And, a plan's funding program may prove years later to have been catastrophically inadequate (to the detriment of the benefit security of all plan participants) because a dilatory lawsuit resulted in the voiding of a fiscally critical plan rule or interpretation.

I. THE NINTH CIRCUIT'S RULING THAT THE ISSUANCE OF EACH ALLEGEDLY INADEQUATE PERIODIC BENEFIT CHECK GIVES RISE TO A SEPARATE AND INDEPENDENT ERISA CAUSE OF ACTION, AND THAT A PLAINTIFF'S LIMITATIONS PERIOD BEGINS RUNNING ANEW WITH THE ISSUANCE OF EACH CHECK, ESTABLISHES A "CONTINUING VIOLATION" THEORY THAT IS IN CONFLICT WITH DECISIONS OF THE FIRST, FOURTH, FIFTH AND DISTRICT OF COLUMBIA CIRCUITS

To the lower court, it is irrelevant when, or even whether, a plaintiff learns that his benefit interests clearly and unequivocally have been affected by some plan action or event. A plaintiff, the Court has decreed, may sue for benefits until he dies and, through the vehicle of his estate, for several years thereafter.[15] In essence, the Ninth Circuit has crafted a "continuing violation" theory for ERISA benefit claims.

Fundamental to its "continuing violation" theory is the Court's characterization of the issuance of each allegedly inadequate employee benefit check as a "wrongful application" of the plan. Appendix, pp. 8a-11a. It is through such a characterization that each periodic payment can be regarded as the basis for an independent cause of action. And, it is this characterization that makes the impact of the Court's decision so pervasive. Virtually any failure to pay the full benefit amount which

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[15] The Ninth Circuit's holding appears to be equally applicable to situations where a benefit that ordinarily is paid periodically is denied entirely rather than simply reduced. The logic underlying the decision below also would require the conclusion that a cause of action to challenge such denial would accrue anew each time the periodic payment would have been due.

a participant claims as properly due can be characterized as a "wrongful application" of a plan.[16]

The "continuing violation" principle adopted by the Ninth Circuit is directly in conflict with those of other

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[16] The rationale employed by the lower court in concluding that the IAM Plan was "improperly applied" required an exceptionally strained reading of ERISA. The court, in reaching its conclusion, first looked to the phrase in Section 302(c)(8) stating: "[n]o amendment . . . which reduces the accrued benefits of any participant shall take effect" unless approved by the Secretary. Using this phrase as a predicate, the court concluded that the phase out amendment was "inoperative." The court then determined that: "The passage of the [phase out] amendment was not a violation of ERISA" because "an amendment must be adopted before it may even be submitted to the Secretary for approval." Appendix, p. 8a. The court, accordingly, declared that the issuance of each new benefit check was an unlawful application of the "inoperative" phase out amendment and therefore constituted a separate violation of the plan.

The Court's rationale was based on a logical *non sequitur*. Moreover, it ignored the clear language of another ERISA provision. If the phase out amendment could be said to have reduced Meagher's "accrued benefits," the phrase "shall not take effect" in section 302(c)(8) would not prevent the amendment from nevertheles being unlawful under ERISA and therefore challengeable immediately. Moreover, ERISA Section 204(g) provides expressly that: "The accrued benefit of a participant under a plan may *not* be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8)." [Emphasis added] This latter provision makes the promulgation of an amendment unlawful whether or not it "takes effect."

In any event, the exact rationale used by the lower court to justify its conclusion that the issuance of each benefit check was an "improper application" of the plan's terms is of little consequence. Virtually any plan rule, interpretation, or eligibility determination can be attacked by characterizing a plan's allegedly inadequate periodic benefit payments as being an "improper application" of the plan's "lawful" provisions. It can be said with equal force and logic that a plan is "wrongfully applied" where the allegedly inadequate benefit amount is the result of: (a) a plan amendment challenged as unlawful, (b) an allegedly arbitrary or capricious plan rule or interpretation, or (c) the failure to properly apply a plan provision to the facts surrounding a specific benefit application.

circuit courts of appeals. Such courts hold that a cause of action to obtain employee benefits accrues only once: when the plaintiff first learns that a plan decision has been made that unambiguously and irrevocably has affected his benefit interests. *Martin v. Bankers Trust*, 565 F.2d 1276, 1278 (4th Cir. 1977); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d 888, 895 (1st Cir. 1978); *Paris v. Wolf, Inc., Profit Sharing Plan, Etc.*, 637 F.2d 357, 360-361 (5th Cir. 1981), *cert. denied*, 464 U.S. 836 (1981); *Miles v. New York State Teamsters Conference Pension and Retirement Fund*, 698 F.2d 593, 598 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983); *Belland v. Pension Benefit Guaranty Corp.*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *affd*, 726 F.2d 839 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880 (1984); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 538 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988).

Most frequently, an ERISA benefit claim accrues (and the limitations period begins running) when a specific application or request for benefits is denied. *Paris v. Wolf, Inc., Profit Sharing Plan, Etc., supra*; *Kosty v. Lewis*, 319 F.2d 744, 750 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964). In many cases, however, a benefit claimant is fully aware from the outset that a change in a plan or plan policy has been made or that other dispositive action affecting his interests has been taken. In such instances, the courts hold that the action accrues from the date on which the plaintiff actually had knowledge of the adverse action. *Cowan v. Keystone Profit Sharing Fund, supra* [17]; *Miles v. New York State Team-*

[17] The plaintiff in *Cowan* also alleged that a plan amendment unlawfully deprived him of benefits. In discussing when his cause of action accrued, the First Circuit noted that: "The basic wrong he complains of . . . was not done when he was refused benefits in 1977 but [instead] occurred earlier, when the Catch up Plan [the plan amendment in issue] was promulgated." "This is not", the court observed, "a case in which the application or interpretation of the terms of a pension plan are unclear." "The terms of the amendment and its effect upon [plaintiff] were always clear."

sters Conference Pension and Retirement Fund, 698 F.2d 593 (2d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983)[18]; *Belland v. Pension Benfit Guaranty Corp., supra*; *Paris v. Wolf, Inc. Profit Sharing Plan, Etc., supra.*[19]

The notion that the issuance of each allegedly inadequate benefit check constitutes an independent (or continuing) cause of action from which the applicable statute of limitations begins running anew has been rejected by the First, Fourth, Fifth and District of Columbia Circuits. *Martin v. Bankers Trust*, 565 F.2d 1276, 1278 (4th Cir. 1977); *Cowan v. Keystone Profit Sharing Fund*, 586 F.2d 888, 895 (1st Cir. 1978); *Miles v. New York State Teamsters Pension Fund*, 698 F.2d 593, 598 (2d Cir. 1982), *cert. denied*, 464 U.S. 829 (1983); *Belland v. Pension Benefit Guaranty Corp.*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *aff'd*, 726 F.2d 839 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 880 (1984); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 538-539 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988). The decisional conflict becomes apparent with a review of the foregoing cases.

In *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977), the plaintiff had been denied pension benefits only a few months before the effective date of ERISA. Section 514 of ERISA, 29 U.S.C. § 1144, expressly provides that remedies under the Act do not apply to any cause of action that accrued before its effective date. Notwithstanding this limitation, the plaintiff sought to bring an action pursuant to the statute by contending that the continued refusal of the defendants to pay bene-

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[18] "A plaintiff's ERISA cause of action accrues, and the . . . limitations period begins to run 'when there has been a repudiation by the fiduciary which is clear and made known to the beneficiaries'." 698 F.2d at 598.

[19] The Fifth Circuit observed that, unlike the case in *Cowan*, the plaintiff before it could not be said to have known unequivocally that his benefit interests had been affected adversely prior to the actual denial of his application. 637 F.2d at 360-361.

fits properly due under the terms of the plan constituted a continuing violation therefore giving rise to a post-ERISA cause of action. The Fourth Circuit disagreed. In its view:

> The contention that the failure to pay such benefits was a continuing breach of duty which brought the claim within the ambit of federal legislation is without merit since it, in effect, would read the . . . [effective date] out of the statute.

565 F.2d at 1277.[20]

Cowan v. Keystone Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978), involved an attempt by a plaintiff to challenge a pre-ERISA plan amendment that excluded him from receipt of certain supplemental retirement benefits. Although the amendment in issue had been promulgated prior to the effective date of the statute, the plaintiff nevertheless urged that his exclusion could be challenged in the federal courts pursuant to ERISA because the benefits to which the challenged amendment pertained were distributed after ERISA's effective date. His cause of action, he contended, arose when these benefits, to which he believed he was entitled, were paid. The First Circuit, in rejecting his argument, observed:

> This is not a case in which the application or interpretation of the terms of a pension plan are unclear. In such cases, plaintiff obviously has no cause for complaint until he is refused benefits to which he has some colorable claim, since it cannot be known earlier how the instrument will be interpreted by the trustees. In this case, . . . there is no question that

[20] Petitioners wish to point out that the Fourth Circuit appears to be inconsistent in its approach to the "continuing violation" concept. In *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975 (4th Cir. 1987), the Fourth Circuit permitted a plaintiff to maintain an action for benefits arguably payable during the three years prior to the filing of her complaint. The *Dameron* court, however, did so without discussion or exposition of any legal rationale justifying such result.

> the explicit terms of the Catch Up Plan [the amendment which was in issue] gave him no right to receive further benefits in 1976 or 1977. * * * The basic wrong of which he complains of thus was not done when he was refused benefits in 1977 but occurred earlier, when the . . . Plan was promulgated. Thereafter the trustees could be expected to administer the Plan in accordance with its terms. * * * [T]he wrong, if any, was done when the . . . Plan amendment was adopted in 1974.

586 F.2d 888 at 895.

A Massachusetts district court subsequently drove the point home still further by holding, in a similar case: "Plaintiff's contention that a new cause of action arises under ERISA every time he receives a benefit less than that to which he feels entitled is untenable." *Comstock v. Pfizer Retirement Annuity Plan*, 524 F.Supp. 999, 1001 at Fn. 2 (D. Mass. 1981).

The District of Columbia Circuit similarly has rejected the notion that the receipt of each allegedly insufficient benefit check gives rise to a new cause of action. *Belland v. PBGC*, 4 E.B.C. 1162, 1165-1166 (D.D.C. 1983), *affirmed*, 726 F.2d 839 (1984), *cert. denied*, 469 U.S. 880, 105 S.Ct. 245 (1984). In that matter, the trustees of a pension plan drastically reduced plaintiffs' monthly benefit amount claiming that the plan, which had terminated, could not support the greater benefits. Plaintiffs contended that this action breached an implied promise made to them and filed suit against the defendants. The District of Columbia limitations period applicable to enforcement of implied contracts was three years. However, the benefit reduction which was the subject of the complaint had been implemented more than four years before the suit's filing. Plaintiffs urged, *inter alia*, that their action was not time barred because each reduced payment constituted a separate breach of the pension agreement. Dismissing this contention out of hand, the District of Columbia Circuit held that a cause

of action for improperly denied benefits arises when the plaintiff learns that an irrevocable adverse decision has been made concerning his benefit expectations and is not resurrected each time a participant receives a benefit check containing less than the amount he believes should be due. As the court succinctly put it:

> . . . [P]laintiffs' contention that each reduced payment of pension funds should be viewed as a continuing breach . . . is severely flawed. In contrast to installment contracts which run for a fixed period and which often are partially performed, the 1975 decision to decrease plaintiffs' benefits was irrevocable and extended for an indeterminate period equal to the length of plaintiffs' lives. As a result, a continuing violation theory to forestall the running of the statute of limitations is clearly inapplicable to plaintiffs' claim. Otherwise defendants correctly argue that plaintiffs advance the absurd proposition that the statute of limitations should not begin to run until the last plaintiff has died.

4 E.B.C. at 1166.

In *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534 (N.D. Oh. 1987), *aff'd per curiam*, 845 F.2d 325 (6th Cir. 1988), a plan participant who had been a salaried employee at his retirement sought an increase in his monthly pension on the ground that the plan administrator had improperly refused to credit him with service for the years when he was an hourly employee. The court found his complaint to be time barred because he had learned some ten years before filing suit that he would not receive credit for the disputed period. Rejecting the plaintiff's contention that his limitations period did not commence running until he first began receiving insufficient pension payments, the court stated:

> The limitations period began to run when plaintiff knew the effect of the Plan upon his hourly service. Defendants' denial of additional years' credit effectively occurred at that time. The Court finds no

> merit in plaintiff's legal arguments that notice to plaintiff in or around 1973 served merely as an anticipatory repudiation and that plaintiff did not need to bring suit until pension payments began. . . . [T]he "proper focus is on the time of the [wrongful] act, not the point at which the *consequences* of the act become painful." *Chardon v. Fernandez*, 454 U.S. 6 (1981). [emphasis in original]

659 F. Supp. 534 at 539.

The foregoing cases, it should be noted, are entirely consistent with the well established rule of law that a cause of action accrues, and a limitations period commences running, when a plaintiff may *first* bring suit to obtain the relief he seeks. *Clark v. Iowa City*, 87 U.S. 583 (1874); *Impro Products, Inc. v. Block*, 722 F.2d 845, 850 (D.C. Cir. 1983) (". . . the cause of action accrues when the right to resort to federal court [is] perfected."); *Santos v. District Council of New York City and Vicinity of United Brotherhood of Carpenters*, 619 F.2d 963, 968 (2d Cir. 1980) ("A cause of action ordinarily accrues when 'the plaintiff could first have successfully maintained a suit based on that cause of action' ").

The plan amendment about which Respondent Frank Meagher complains in this action was adopted in September 1976 by vote of the delegates to an International Association of Machinists and Aerospace Workers International Convention. The amendment, which the Union's Constitution made binding upon the Trustees, was unequivocal in its renunciation of future benefit adjustments. Hence, if the "living pension" adjustments were "accrued benefits" within the meaning of the Act, then those "accrued benefits" were reduced on January 1, 1977, the date the amendment became effective.

The court below concedes that Meagher was fully aware from the outset that his benefit interest had been affected adversely by the 1977 amendment. Meagher was an International General Vice-President who had been

actively involved in each step of the amendment's consideration and promulgation. It is clear that he could have brought suit against the Plan as early as 1977. Certainly, Meagher could have done so, as the District Court noted, by the Fall of 1979, when the Plans' summary descriptions were issued. By the issuance of those documents, the Trustees unequivocally renounced the future payment of "living pension" adjustments. Meagher, instead, chose to wait more than nine years before pursuing his claim.

It was only by virtue of the Court's adoption of its "continuing violation" theory that Meagher's suit was considered timely. As noted above, other courts take a radically different approach to claims of continuing violations in employee benefit contexts.[21] The conflict among the circuits which the Ninth Circuit's decision has created demands resolution by this Court.

II. THE "CONTNUING VIOLATION" CONCEPT APPLIED BY THE NINTH CIRCUIT IS IN CONFLICT WITH PRINCIPLES OF LAW ESTABLISHED BY THIS COURT AND OTHER CIRCUITS AS TO WHEN CAUSES OF ACTION ACCRUE UNDER EMPLOYEE PROTECTIVE STATUTES GENERALLY

At the foundation of the lower court's ruling is the assumption that a cause of action to remedy an alleged wrong remains vital so long as the effects of the alleged

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[21] It should be noted that the federal courts, in some ERISA fiduciary liability cases, have found the occurrence of "continuing violations" of fiduciary duties. These cases, however, are very limited in scope and have no applicability to actions, like the instant proceeding, for benefits. Such cases advance the legal proposition that ERISA imposes a continuing fiduciary duty to monitor and review fund investments. Accordingly, an action for breach of the fiduciary duty to monitor or review investments can be brought even though an action alleging that the initial purchase of the suspect asset was imprudent is time barred. See *Morrisey v. Curran*, 567 F.2d 546, 548-49 (2d Cir. 1977); *Whitfield v. Cohen*, 682 F. Supp. 188, 196 (S.D. N.Y. 1988).

wrong are felt. But, this Court has made it plain in the context of other employee protective statutes that such an approach is improper. Rather it is the time a plaintiff becomes aware of the facts that constitute the claimed violation that gives rise to a cause of action. A cause of action is not resuscitated simply because the effects of the purported violation may not be felt until later or continue for a period of time. *Florida v. Long*, —— U.S. ——, 101 L.Ed.2d 206, 221 (1988) ("It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation"); *United Airlines, Inc. v. Evans*, 431 U.S. 553, 559 (1977) (a discriminatory act begins the running of the statute of limitations, even if the act has consequences at a later time); *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 8-9 (1981) ("continuing *impact* from past violations is not actionable").

These principles are not limited to employment discrimination cases. They are followed as well by the various circuit courts of appeals in the contexts of other employee protective statutes.

With respect to suits pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging denial of fair representation, the courts find that "continued . . . activity after [a union's] initial failure to respond to a grievance request does not constitute a continuing violation of the duty of fair representation." *Adams v. Budd Co.*, 846 F.2d 428, 431 (7th Cir. 1988), cert. pending; *Metz v. Tootsie Roll Ind., Inc.*, 715 F.2d 299, 305-6 (7th Cir. 1983). The same position is held in fair representation cases brought under the Railway Labor Act. *Englehardt v. Consolidated Rail Corp.*, 756 F.2d 1368, 1370 (2d Cir. 1985) (". . . the union's activity (or lack thereof) since the [challenged] agreements were entered into does not constitute a continuing violation . . . ."). Similarly, in connection with the employee "whistleblower" protective provisions included in the En-

ergy Reorganization Act, the Fourth Circuit has ruled that a cause of action for retaliatory discipline accrues, for purposes of the running of the limitations period, when the plaintiff learns of the employer's adverse determination rather than when the effects of that decision are felt later. *English v. Whitfield*, 858 F.2d 957, 961 (4th Cir. 1988).

The Ninth Circuit in this matter has made the fundamental error of confusing an action (the adoption or implementation of the disputed phase-out amendment) with its ministerial consequences (reduced pension checks).[22]

III. THE NINTH CIRCUIT'S RULING THAT THE STATUTE OF LIMITATIONS APPLICABLE TO ACTIONS FOR RECOVERY OF EMPLOYEE BENEFITS UNDER ERISA SECTION 502(A)(1)(B) IS THE THREE YEAR/SIX YEAR PERIOD WHICH ERISA SECTION 413 PRESCRIBES FOR SUITS CHARGING BREACH OF FIDUCIARY DUTY CONFLICTS WITH THE DECISIONS OF THE SECOND, FOURTH, SIXTH, SEVENTH AND EIGHTH CIRCUITS

The decision below squarely conflicts with the rulings of other circuits for a second reason. An essential element of the Ninth Circuit's decision is its conclusion that the limitations period applicable to suits brought by a participant to recover benefits due under the terms of an employee benefit plan is the three year/six year period set out in ERISA Section 413, which provision pertains to suits seeking relief from alleged breaches of fiduciary duty.[23] But, every other Circuit that has con-

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[22] Once a decision concerning a participant's benefits is made, the plan's subsequent dealings with him are purely ministerial. Checks (if any payment is to be made) are issued routinely (usually by computer).

[23] Appendix, p. 7a. The Court of Appeals opinion contains dicta suggesting that the Trustees breached a "duty to administer the plan in accordance with the documents and instruments of the Plan

sidered the question of which statute of limitations is applicable to such employee benefit disputes has adopted and applied, pursuant to the decisional guidelines established by this Court in *United Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1983), the state limitations period applicable to actions to enforce written contracts. *Miles v. New York State Teamsters Pension Fund*, 698 F.2d 593, 598 (2d Cir. 1982), *cert. denied*, 464 U.S. 829 (1983); *Dameron v. Sinai Hospital of Baltimore, Inc.*, 815 F.2d 975, 981 (4th Cir. 1987); *Turner v. Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 539 (N.D. Oh. 1987), *aff'd*, 845 F.2d 325 (6th Cir. 1988); *Jenkins v. Teamsters Local 705 Pension Plan*, 713 F.2d 247, 252 (7th Cir. 1983); *Fogerty v. Metropolitan Life Ins. Co.*, 850 F.2d 430, 432 (8th Cir. 1988). See also Bruce, *Pension Claims*, Bureau of National Affairs (Washington, 1988), p. 664.[24] Similar rulings have been made by district courts in other Circuits. *Ferguson v. Greyhound Retirement & Disability Trust*, 613 F. Supp. 323, 324 (E.D. PA 1985); *c.f. Corkery v. Superex Drugs Corp.*, 602 F. Supp. 42 (M.D. FL 1985).

Section 502(a)(1)(B) authorizes a plan participant to bring suit "to recover benefits due him under the terms

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that are not inconsistent with ERISA". Appendix, p. 9a. However, the lower court did not actually find the cause of action to which it applied the three year/six year limitations period to be based on fiduciary considerations. The Court held only that Meagher's claim was "stated timely . . . under 29 U.S.C. § 1132(a)(1)(B) [ERISA § 502(a)(1)(B)]." Appendix, p. 10a. That section authorizes suits to recover benefits due under the terms of a plan. It is other ERISA provisions which afford jurisdiction for actions seeking to remedy alleged fiduciary breaches. ERISA §§ 502(a)(2) and (3); 29 U.S.C. §§ 1132(a)(2) and (3).

[24] "For benefit claims based on the terms of a plan, the courts have almost uniformly held the most analogous state statute of limitations is to be applied to test the timeliness of an action—even though many claims for benefits under the terms of a plan are framed at least in the alternative, as claims for breach of fiduciary duty."

of his plan". However, ERISA does not establish a limitations period within which benefit claims pursuant to that section must be brought. *Jenkins v. Teamsters Local 705 Pension Plan, supra.* ERISA itself contains only one limitations provision: Section 413, 29 U.S.C. § 1113. Section 413, by its terms, is applicable only to actions seeking relief from alleged breaches of fiduciary duty.[25]

This Court has provided explicit guidance as to the approach which federal courts must take in instances where a federal remedial statute is silent on the subject of a limitations period. In *United Auto Workers v. Hoosier Cardinal Corp., supra,* it held that such statutory gaps should be filled by applying to the federal claims the most analogous state statute of limitations. See also the Court's more recent decision in *Reed v. Transportation Union,* —— U.S. ——, 102 L.Ed.2d 665 (1988). The failure of the court below to follow the *Hoosier Cardinal* principles by itself renders its ruling materially inconsistent with those of other Circuits.

Although it cannot be said that the final outcome of the instant litigation will turn on the issue of which of the arguably appropriate statutes of limitations should have been applied by the court below,[26] this case nevertheless presents the Court with the opportunity to resolve an issue critical to the administration of ERISA's remedial scheme. It is esential that both plaintiffs and defendants know with certainty the boundaries of available relief under ERISA.

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[25] The text of Section 413 is reproduced at p. 25a, *infra.*

[26] If this Court concludes that an ERISA cause of action to obtain employee benefits does not arise anew with the issuance of each allegedly inadequate benefit check, it is irrelevant whether the three year limitations period applicable to enforcement of contracts under District of Columbia law (as urged by the Fund below or the three year/six year period prescribed by ERISA Section 413 is adopted. The instant complaint was not filed until more than nine years after the phase out amendment became effective.

IV. THE "CONTINUING VIOLATION" CONCEPT ANNOUNCED BY THE NINTH CIRCUIT WILL HAVE A SERIOUSLY ADVERSE IMPACT ON EMPLOYEE BENEFIT PLAN ADMINISTRATION AND UNDERMINE THE BENEFIT SECURITY OF PLAN PARTICIPANTS

The consequences of the lower court's decision to the administration of the more than 875,000 private employee benefit plans throughout the United States [27] are very serious. By effectively ruling that any decision by a plan sponsor, board of trustees or administrator that arguably affects a participants's benefits is forever subject to judicial challenge, the Ninth Circuit has destroyed a fundamental premise upon which employee benefit plans are established and maintained: the presumption that, at some fixed point in time, those decisions will become unchallengeable, and therefore final. Indeed, finality is essential if employee benefit plans are to provide the promised benefits upon which their participants rely.

Many sorts of decisions made by plan sponsors, trustees, and administrators can affect the amount of benefits. This is particularly true with respect to decisions relating to basic plan design issues such as participation, eligibility, accrual and vesting rules. But, trustee interpretations of plan rules also can have a significant impact on benefits. The reason why these sorts of decisions have such an effect on benefits is that they are, of necessity, a major factor in the plan's actuarial assumptions and funding projections. Accordingly, the judicial overruling or limitation of a fiscally critical plan rule or interpretation can have a direct impact on the sufficiency of a plan's funding and, concomitantly, the benefit security of its participants.

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[27] Number of plans derived from U.S. Department of Labor tabulations of 5500 forms and Employee Benefit Research Institute tabulations of Internal Revenue Service determination letter data. *Employee Benefit Notes*, Vol. 9, no. 5, May, 1988, pp. 7-8, published by the Employee Benefit Research Institute.

Without the assurance that its rules are, or will soon become, final, the ability of employee benefit plans to provide promised benefits is substantially jeopardized because funding projections (which by their nature must be long term) cannot be made with any degree of precision. However, where such a rule is rendered invalid years (or even decades) after its adoption, as the holding below now permits a court to do, the plan may suddenly find itself catastrophically underfunded.

Underfunding resulting from the belated nullification of a critical plan rule will severely prejudice the plan's participants.[28] At the very least, their benefit security will be badly compromised.[29] Indeed, their plan may be forced to terminate and anticipated benefits lost because they no longer are backed by adequate assets.[30]

Even when termination can be avoided, the injury to a plan's participants still will be great. This is so because

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[28] In most instances, the effect of litigation concerning a plan rule, interpretation, or action brought by an individual will be the same as that resulting from a class action. ERISA imposes on plan trustees the obligation to treat in the same manner all plan participants who are similarly situated. See, e.g.: *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982). Accordingly, it is not uncommon for the resolution of benefit disputes initiated by a single individual nevertheless to effect whole classes of, if not all, participants.

[29] In the instant case, the level of unfunded benefits would increase dramatically if judgment ultimately were entered and its underlying bases applied to all plan participants. The Plan's actuaries have estimated the potential cost of reinstating the "living pension" feature to be as much as $110,000,000. To amortize this massive additional liability in compliance with ERISA's funding rules, the International Union would be forced to contribute annually to the Plan an amount equal to 50.2% of payroll.

[30] In a welfare plan, benefits may be lost altogether because such benefits are not insured. But, the actuarial insolvency of a pension plan is likely to result in a loss of benefits too since not all benefits are guaranteed by the Pension Benefit Guaranty Corp. See generally Title IV of ERISA, 29 U.S.C. §§ 1301 *et seq.*

a funding deficiency, whatever its cause, must eventually be remedied. In the majority of cases, the only revenue which a plan could use to meet a serious actuarial deficit is the stream of future employer contributions.[31] The necessity to divert a portion of this stream, however, leaves a plan with no option but the reduction of the rate at which future benefits accrue.[32] When this occurs, each active plan participant, in essence, suffers an involuntary pay cut.

The Ninth Circuit's decision in this matter will cause harm to plan participants for another reason. Because trustees and administrators no longer can presume that the rules defining the structure of their plans are final, they will be forced to become far more conservative in their funding projections for new plans (or additional benefits in existing programs) as a hedge against the possibility that a fiscally critical plan rule will be overturned some day. As a result of this new conservatism, it can reasonably be expected that benefit levels will be depressed markedly below where they otherwise would be.

The state of perpetual instability in the employee benefit system caused by the Ninth Circuit's ruling is itself sufficient reason for review of this matter.

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[31] This is particularly true with respect to collectively bargained pension plans. Contribution rates to such plans generally cannot be increased mid-term.

[32] As this Court has observed in another context: "If the reserves prove inadequate, either the expectations of all retired employees will be disappointed or current employees will be forced to pay not only for their own future security but also for the unanticipated reduction in the contributions of past employees." *Los Angeles v. Manhart*, 435 U.S. 702, 703 (1978). This is so because employer contributions are set at a rate estimated (through actuarial methods) to be sufficient to pay both for the expected accrual of future benefits and amortize any past service credit granted participants.

CONCLUSION

Limitation periods are a fundamental element of the American legal system.'[33] Their primary value is to provide fairness to potential defendants. The expiration of a limitation period enables a party "to conduct its daily business without the fear of having to defend against stale claims and unfair surprises." Limitations are also beneficial to the judicial system because they promote a prompt review of contested claims and help to keep already overloaded court dockets from becoming worse. And, limitations serve the interest of society because they "help to preserve stability in commercial relations."[34] As one commentator has put it:

> . . . legislators design statutes of limitations to protect the interests of defendants, the courts, and society. Failure of a litigant to bring suit within the specified limitations period will generally result in dismissal of an otherwise valid claim. Such a result may appear harsh in any particular case since it may deny an injured party relief. The overall benefits, however, of statutes of limitation generally outweigh their disadvantages.

Determining Limitation Periods, supra, note 2, at pp. 898-899.

The Ninth Circuit, by its decision below, has spurned these important principles. As a result, employee benefit plan participants no longer need be diligent in pursuing claims. Plan rules and decisions made decades earlier

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[33] *Determining Limitation Periods for Actions Arising Under Federal Statutes*, 41 Southwestern Law Journal 895, at pp. 897-898 (1987). For a perspective on the development of limitations principles from ancient legal systems to the present, see the historical references cited in *Special Project; Time Bars in Specialized Federal Common Law*, 65 Cornell Law Review 1011, at pp. 1020-1023 (1980); and *Developments in the Law: Statutes of Limitations*, 63 Harvard Law Review 1177, at pp. 1177-1180 (1950).

[34] *Determining Limitation Periods, supra* note 2, at pp. 897-898.

now remain susceptible to challenge. Accordingly, the volume of ERISA litigation can be expected to increase markedly and the burden on the federal court system to become even greater. But most importantly, the stability necessary to the efficient functioning of the employee benefit system has been undermined totally.

For the reasons set forth herein, petitioners respectfully request that a writ of certiorari be issued to the court below.

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March 1, 1989

APPENDIX

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2312

D.C. No. CV-86-2435-SC

OPINION

FRANK MEAGHER,
Plaintiff-Appellant,
v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER; and GEORGE KOURPIAS, as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Samuel Conti, District Judge, Presiding

Argued and Submitted
April 15, 1988—San Francisco, California

Filed September 12, 1988

Before: Joseph T. Sneed, Procter Hug, Jr. and Alex Kozinski, Circuit Judges.

Opinion by Judge Hug

OPINION

HUG, Circuit Judge:

Plaintiff Frank Meagher appeals from the district court's award of summary judgment in favor of the International Association of Machinists and Aerospace Workers Pension Plan ("the Plan") and the Plan's trustees. The district court held that Meagher's action was barred by the applicable statute of limitations under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1113 (1982). We reverse the district court's judgment.

I

Frank Meagher was an officer of the International Association of Machinists and Aerospace Workers ("IAM") for 20 and one-half years prior to his retirement on July 1, 1977. That organization, as an employer, administered an employee pension plan for the officers, organizers, and support staff it employed. Meagher's rights under the Plan had fully vested and accrued years prior to his retirement. The Plan contained a "living pension" feature that increased the monthly benefit payments proportionately to any future salary increases of the position from which the pensioner retired. Thus, under this provision, Meagher's pension benefits were tied to the current salary of the job he held before he retired. *See Shaw v. Int'l. Assoc. of Machinests and Aerospace Workers Pension Plan*, 750 F.2d 1458, 1459-60 (9th Cir.) (explaining the living pension feature), *cert. denied*, 471 U.S. 1137, (1985).

In September, 1976, the delegates to the 1976 IAM convention voted to amend the pension plan to phase out the living pension feature. Under the amendment, the living pension increases were to be progressively cut back from January 1, 1979 on, and were scheduled to end January 1, 1985. In February, 1979, soon after the Plan's trustees began implementing the phase-out, letters were sent to all retirees explaining the effect of the amendment upon their benefits. In October, 1979, the trustees sent Summary Plan Descriptions to all plan participants, describing how the living pension feature was being phased out. The cover letter stated that the Plan had been qualified by the IRS and had been "revised to comply with [ERISA]."

On December 1, 1981, a plan participant, Edward Shaw, filed a class action in federal district court against the Plan and its trustees, challenging the application of the amendment. Shaw, who had retired on January 1, 1975, brought the action individually and on behalf of those similarly situated. The district court in that action found that "the actions of defendants in attempting to phase-out the living pension feature in the pension plan were not justified under ERISA. . . ." *Shaw v. International Ass'n of Machinists-Aerospace*, 563 F. Supp. 653, 657 (C.D. Cal. 1983). We affirmed on January 11, 1985. *See Shaw*, 750 F.2d at 1466.

Our analysis in *Shaw* focused on 29 U.S.C. § 1054 (g)(1), which provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title." 29 U.S.C. § 1054(g)(1) 1982.[1] Section 1082(c)(8) sets forth certain criteria

[1] The amended version of 29 U.S.C. § 1054(g)—which was not before us in *Shaw*—reads as follows: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title." 29 U.S.C.A. § 1054(g)(1) (Supp. 1988). The

an amendment must satisfy in order to reduce accrued benefits. One criterion is that the amendment must meet with the approval of the Secretary of the Treasury. 29 U.S.C. § 1082(c)(8) (1982). The Secretary may approve the amendment only if he determines that it is "necessary because of a substantial business hardship." *Id.* The trustees had not obtained the Secretary's approval by the time of the *Shaw* case, nor have they obtained it since.[2] Under the plain language of section 1082(c)(8), "No amendment . . . which reduces the accrued benefits of *any* participant *shall take effect*" unless the Secretary approves it. (Emphasis added.) Because an amendment cannot take effect without the Secretary's approval, it cannot be applied to reduce the accrued benefits of any participant under the Plan, as specified in 29 U.S.C. § 1054(g)(1). The amendment is simply inoperative, and the Plan must be administered without giving any effect to the amendment.

In *Shaw*, we had to determine first whether the living pension feature was, indeed, an accrued benefit, for the prohibition of section 1054(g)(1) applies only to the reduction of "accrued benefits," and the Secretary's approval, as provided for in section 1082(c)(8), is necessary only for amendments which reduce the "accrued benefits" of any participant. We determined in *Shaw* that the living pension feature was an accrued benefit, stating: "[The] entire [IAM] pension benefit—including the living pension feature—was promised, anticipated, and *ac-*

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reference to section 1441 in the amended version, however, does not affect our analysis here. The parties do not claim that the amendment in question is one described in section 1441. Thus, for simplicity's sake, we will refer to section 1054 in its pre-amended form.

[2] Section 1082(c)(8) provides a ninety-day limit after a notice of an amendment is filed within which to approve or disapprove the amendment. If no action is taken, it is deemed approved. In this case, the required notice of the amendment was never filed with the Secretary.

crued." *Shaw*, 750 F.2d 1466 (emphasis added). We noted the Supreme Court's statement that " 'Congress through ERISA wanted to ensure that "if a worker has been *promised a defined pension benefit* upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—. . . he actually receives it" ' " *Shaw*, 750 F.2d at 1465, *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

Because the amendment was one that decreased accrued benefits and the Secretary's approval was not obtained, we held that the amendment did not take effect. Having made this determination, it was clear that the amendment could not be applied to *anyone* because the amendment had not taken legal effect, and, indeed, could not take effect until the Secretary's approval had been obtained in accordance with 29 U.S.C. § 1082(c)(8). We stated in *Shaw*:

> The IAM declined to take advantage of the statutory escape valve that allows the Secretary to approve amendments decreasing accrued benefits upon a showing of substantial business hardship. 29 U.S.C. § 1082(c)(8). Perhaps the IAM can now submit its discussion of financial hardship, which is irrelevant to our decision, to the Secretary. We see no time limit on applications brought under that escape valve section.

Shaw, 750 F.2d at 1465. The IAM to this day has not done so and, thus, the amendment still has not taken effect.

Following our decision, the parties to *Shaw* submitted, apparently on their own initiative, a program of compliance with the *Shaw* judgment. The defendants agreed to apply prospectively the living pension feature to all participants who, like Shaw, had retired prior to January 1, 1977, and to also reimburse those retirees for the past adjustments they were entitled to but did not

receive. *See* ER 9-10. The parties, however, agreed that these measures would be taken with respect to the pre-January 1, 1977 retirees only—the class of litigants in *Shaw*—and not to any other retirees. They then requested the district court to confirm the essential portions of the program of compliance, which it did by issuing an order outlining the program.[3] The trustees continued to apply the ineffective amendment to Meagher and others who were not *Shaw* litigants. This, of course, was in violation of section 1054(g)(1). The trustees could not legally apply the amendment to anyone until it had taken effect by virtue of the Secretary's approval.

The trustees disclosed the *Shaw* litigation to the plan beneficiaries in a letter dated February 14, 1986. The letter stated, "Please note that *the judgment applies only to pensioners who retired before January 1, 1977, and their beneficiaries.*" (Emphasis in original.) Ten days later, Meagher wrote to one of the trustees asking why the *Shaw* judgment did not also apply to him. The trustee wrote back, simply reiterating the trustees' previous position that the *Shaw* ruling applied only to those who retired prior to January 1, 1977.

About two months later, on May 13, 1986, Meagher filed this action in federal district court. He claimed that the application of the amendment to reduce his accrued benefits violated section 1054(g)(1) of ERISA as determined by *Shaw*. He sought a declaratory judgment that the application of the amendment was a violation of ERISA and a judgment ordering the trustees to pay

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[3] The order states that the remedy is limited to the *Shaw* litigants. This is not surprising. The order could apply only to those litigants before the court in that case. That the effect of the order was limited, however, certainly does not mean that the effect of our decision was so limited. Any agreement between the *Shaw* litigants and the Plan and its trustees that purported to bind pensioners who retired *subsequent* to January 1, 1977 would not be binding upon such pensioners. They are not part of the *Shaw* litigants class.

to him the amount of benefits he is entitled to receive without application of the amendment.

The parties filed cross-motions for summary judgment, and the district court granted the defendants' motion. It did so on the basis that the applicable statute of limitations under ERISA, 29 U.S.C. § 1113, barred Meagher's action. Meagher appealed. We exercise our jurisdiction under 28 U.S.C. § 1291 (1982). Our review is *de novo*. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

II

The statute of limitations, 29 U.S.C. § 1113, provides as follows:

> § 1113. Limitation of actions
>
> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

To apply the limitations period, we must first isolate and define the underlying violation upon which Meagher's claim is founded. The district court proceeded on the assumption that the violation in this case was the enactment of the amendment. It noted that Meagher had to have been aware of the amendment at least by October 10, 1979 because the trustees sent a letter on that date to all plan participants explicitly informing them of the amendment. The court explained, "At that time Meagher had knowledge of the events which gave rise to his cause of action." Applying the six-year period,[4] the court found that Meagher's time for filing suit expired in October of 1985, seven months before Meagher filed his action.

Meagher's cause of action accrued only when his accrued benefits were "decreased by an amendment of the plan, other than an amendment described in section 1082 (c)(8) of this title." 29 U.S.C. § 1054(g)(1). The district court suggests that passage of the inoperative amendment, or when Meagher found out the amendment was passed, was the precise accrual date. We disagree. Meagher was harmed only by the wrongful *application* of the amendment. Only then were his accrued benefits *decreased*. The passage of the amendments was not a violation of ERISA; an amendment must be adopted before it may even be submitted to the Secretary for approval.[5]

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[4] It is unclear why the court applied the six-year period to commence from Meagher's knowledge of the amendment. Knowledge of the violation or breach commences the three-year period. *See* 29 U.S.C. § 1113(a). However, this point is irrelevant to our analysis because we find that the district court erred in identifying the underlying violation.

[5] Section 1082(c)(8) is structured such that an amendment submitted to the Secretary must already meet the criteria outlined in subsection (A), (B), and (C). Subsection A refers to amendment which "*is adopted* after the close of such plan year" (emphasis added). Thus, amendments submitted to the Secretary must have been adopted, not simply proposed.

III

Meagher's claim is brought under 29 U.S.C. § 1132 (a)(1)(B) (1982), which provides:

> A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

ERISA charges the trustees and fiduciaries with the duty to administer the pension plan "in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." 29 U.S.C. § 1104 (a)(1)(D) (1982).

Despite our holding in *Shaw*, the trustees have continued to apply the inoperative amendment to all but *Shaw* litigants. This is a denial of benefits to which Meagher was, and will become entitled and with respect to which he seeks "to recover . . . [and] to enforce his rights under the terms of the plan . . . ." 29 U.S.C. § 1132(a)(1)(B). Each check issued to him an amount reduced under the inoperative amendment constitutes a fresh breach by the trustees of their duty to administer the pension plan in accordance with the documents and instruments of the Plan that are not inconsistent with ERISA, as required by 29 U.S.C. § 1104 (a)(1)(D). A separate cause of action arises with the issuance of each check, and the limitations period runs separately for each cause of action.

The limitations period is six years from the breach or violation, or three years from Meagher's knowledge of the breach or violation, whichever is earlier. 29 U.S.C. § 1113(a). We have held that the "statute of limitations is triggered by [a claimant's] knowledge of the

transaction that constituted the alleged violation, not by [his] knowledge of the law." *Blanton v. Anzalone*, 760 F.2d 989, 992 (9th Cir. 1985). Each time Meagher received a check, he had knowledge of the transaction, though he may not have known at the time that the reduction in benefits was unlawful under ERISA.

Thus, the issuance of each check commenced a six-year period and Meagher's receipt of the check commenced a three-year period. Since the three-year period expires earlier, it is the one we apply. 29 U.S.C. § 1113(a)(2). Meagher brought this action on May 13, 1986. To determine how many breaches are actionable, we calculate three years back from May 13, 1986. Meagher's claims are thus timely for all checks issued since May 13, 1983. Meagher has stated timely claims under 29 U.S.C. § 1332 (a)(1)(B) to recover benefits due him under the Plan.[6]

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[6] Meagher also brought his action under 29 U.S.C. § 1132(a)(3) for equitable relief and damages. The Supreme Court in *Massachusetts Mutual Life Inc. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085 (1985), held that fiduciaries of a pension plan could not be held personally liable to a plan beneficiary for extra-contractual compensatory or punitive damages under 29 U.S.C. § 1132(a)(2) but did not reach the question of whether they could be liable under 29 U.S.C. § 1132(a)(3). Here, the claim against the fiduciaries individually was for failure to pay the benefits to which Meagher was contractually entitled under the pension plan. No basis for "extra contractual" damages or punitive damages was alleged.

Meagher has received the full relief allowable under the applicable limitations statute provided by 29 U.S.C. § 1132(a)(1)(B). His rights have been clarified and his rights to his pension, not decreased by the ineffective amendment, have been established. To the extent that such relief may also be embraced by 29 U.S.C. § 1132(a)(3), any declaration to that effect would be supererogatory.

CONCLUSION

In *Shaw*, we held that the amendment to the pension plan reduced accrued benefits and was inoperative until approved by the Secretary of the Treasury. No approval has since been obtained, and we hold that the amendment remains inoperative to all participants. Meagher's action for recovery of benefits is timely as to all benefits withheld since May 13, 1983 and as to the declaration of future benefits.

We reverse and remand for proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2312
D.C. No. CV-86-2435-SC

FRANK MEAGHER,
Plaintiff-Appellant,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER; and GEORGE KOURPIAS, as fiduciaries and trustees of the International Association of Machinists and Aerospace Workers Pension Plan,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Before: SNEED, HUG, and KOZINSKI, Circuit Judge.

ORDER

[Filed Dec. 1, 1988]

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Hug and Kozinski have voted to reject the suggestion for rehearing en banc, and Judge Sneed has recommended rejection of the suggestion.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86 2435 SC

FRANK MEAGHER,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, *et al.*,

Defendants.

JUDGMENT

[Filed May 28, 1987]

In accordance with the order entered by the court herein, it is hereby ordered, adjudged and decreed that:

(1) plaintiff's motion for summary judgment is denied; and

(2) defendants' motion for summary judgment is granted, and this action is dismissed.

Dated: May 22, 1987.

/s/ SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 86 2435 SC

FRANK MEAGHER,

Plaintiff,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN, *et al.*,

Defendants.

ORDER RE MOTIONS FOR SUMMARY JUDGMENT

[Filed May 28, 1987]

Plaintiff Frank Meagher ("Meagher") is a participant in a pension plan sponsored by the International Association of Machinists and Aerospace Workers ("Union"). He challenges an amendment to the plan which phased out and eventually eliminated a post-retirement benefit adjustment provision ("living pension"). He contends that the amendment denies him an accrued benefit in violation of section 204(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. 1054(g). This action is presently before the court on the parties' cross motions for summary judgment.

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). Once a summary judgment

motion is made and properly supported, the adverse party may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Myrtle Nell Catrett*, 477 U.S. ——, 91 L.Ed.2d 265 (1986).

Defendants move for summary judgment on the basis of the statute of limitations. They argue that Meagher's action is governed by state statute of limitations, which is either three years in the District of Columbia or four years in the state of California. They claim that plaintiff's causes of action accrued at the latest on January 1, 1977, the date the amendment went into effect, and are therefore untimely.

The statute of limitations for a breach of fiduciary duty under ERISA is the earlier of (1) six years after the date of action or omission by the fiduciary, or (2) three years after the date plaintiff had actual knowledge of the breach, or on which a report from which he could reasonably be expected to have obtained knowledge was filed with the Secretary. 29 U.S.C. § 1113. If there is fraud or concealment, however, a plaintiff may bring his action not later than six years after the date of discovery of the breach or violation. *Id.* The statute of limitations is triggered by knowldege of the transactions that constitutes the alleged violation, not by knowledge of the law. *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985).

Plaintiff's complaint is for breach of fiduciary duty under ERISA. Complaint, ¶ 10. Therefore, the applicable statute of limitations is six years.

The Union's pension plan was created in 1980 as a result of a merger of three predecessor staff pension plans. Affidavit of Eugene D. Glover ("Glover affidavit") ¶ 5. Prior to that, at the 1976 Union convention, the executive council of the Union submitted a proposed constitutional amendment which would, *inter alia*, phase out

the post retirement living pension of the three plans. *Id.* ¶ 13. This proposed amendment became effective January 1, 1977. *Id.* ¶ 14. In the spring of 1977, the Union distributed copies of the revised Union constitution, which included the pension plan revisions, to all members of the Union executive council and to all district and local lodges. *Id.* At the time, Meagher served as a member of the executive council and general vice president to the Union. Declaration of Frank Meagher in support of plaintiff's motion for summary judgment ("Meagher declaration") ¶ 2. On May 16, 1977, the Union submitted the pension plans to the Internal Revenue Service with a request for favorable determination letters. Glover affidavit ¶ 14. At the same time, the Union sent notice of the IRS filings to all plan participants with instructions how to protest the filings. *Id.* No one filed a protest. *Id.* On February 10, 1978, the IRS issued favorable determination letters for each plan. In February, 1979, as the Union began implementing the phase out, it sent letters to all retirees explaining how the amendment would affect them. *Id.* On October 10, 1979, the Union sent summary plan descriptions to all participants which explained the essential features of the plans and detailed the phase out of the living pension.

As a member of the executive council, plaintiff would have been aware in the spring of 1977 of the amendment phasing out the living pension amendment. In any case, by the Union's October 10, 1979 letter to all pension participants explaining the phase out of the living pension, plaintiff would have had knowledge of the phase out.

Meagher claims that although he knew that the Union was phasing out the living pension, he did not suspect that it was illegal to do so until December 1985, when he learned of litigation regarding the living pension, *Shaw v. International Association of Machinists and Aerospace Workers Pension Plan*, C 81 6076 AAH. Meagher further claims that the pension plan trustees concealed the ex-

istence of the litigation from him. Thus, Meagher argues, the statute of limitations did not accrue until December 1985. Meagher cites *Brock v. Nellis*, 809 F.2d 753 (11th Cir. 1987) in support of this proposition. In *Brock*, the Eleventh Circuit held that constructive knowledge, i.e. knowledge of facts sufficient to prompt an inquiry, which, if properly carried out, would have revealed the fiduciary breach, did not satisfy the "actual knowledge" required to commence the running of the statute of limitations. *Id.* at 755.

As discussed earlier, however, the Ninth Circuit has ruled that the statute of limitations is triggered by knowledge of the transaction that constitutes the alleged violations, not by knowledge of the law. *Blanton v. Anzalone*, 760 F.2d 989, 992 (1985). The Ninth Circuit is controlling authority. Thus, this court finds that the statute of limitations began to run at the latest in mid-October of 1979, when plaintiff received a letter from the Union explaining that it was phasing out the living pension. At that time, Meagher had knowledge of the events which gave rise to his cause of action. Therefore, the time for filing a complaint expired in October of 1985, before Meagher filed his complaint. Accordingly, the court grants defendants' motion for summary judgment. Because the court grants defendants' motion for summary judgment, it denies plaintiffs' motion for summary judgment.

In accordance with the foregoing, the court hereby orders that:

(1) defendants' motion for summary judgment is granted; and

(2) plaintiffs' motion for summary judgment is denied.

Dated: May 22, 1987.

/s/ SAMUEL CONTI
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C86-2435

Contract (Breach of Retirement Income Security Act)

FRANK MEAGHER,

Plaintiff,

vs.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN; WILLIAM WINPISINGER, EUGENE GLOVER and GEORGE KOURPIAS as fiduciaries and trustees of the INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS PENSION PLAN,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, BACK PAY AND REFORMATION

[Filed May 13, 1986]

Plaintiff Frank Meagher, a participant in and beneficiary of a pension plan governed by the Employment Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. 1001 et seq., complains of defendants and alleges as follows:

JURISDICTION

1. The jurisdiction of this Court to grant declaratory equitable relief as well as damages is invoked pursuant to ERISA, 29 U.S.C., Sections 1132(a)(1)(B), 1132(a)(3)(B) and 1132(e)(1).

VENUE

2. Venue is proper in the United States District Court for the Northern District of California pursuant to 29 U.S.C. 1132(e)(2).

PARTIES

3. From late 1956 until his retirement on July 1, 1977, plaintiff was a member of the International Association of Machinists and Aerospace Workers ("the Union"). During such period of 20 years and 7 months, plaintiff was a participant in and prospective beneficiary of the defendant International Association of Machinists and Aerospace Workers Pension Plan ("the Plan"). Under the Plan plaintiff is now entitled to receive, and does receive, his pension benefits at his place of residence in Sebastopol in the Northern District of California.

4. Plaintiff is informed and believes that defendants Eugene Glover, William Winpisinger and George Kourpias are fiduciaries and trustees of the Plan. Defendant Plan can be found in the Northern District of California where the breach of defendants' duties hereinafter described has occurred.

5. From the time of the commencement of plaintiff's employment by the Union in 1956 until shortly before his retirement on July 1, 1977, a period of approximately 20 years, as an inducement to his continued employment during that period, the defendant Plan provided for a so-called "living pension" benefit increase after retirement to match the pay increases granted to persons holding the retiree's former job. The specific language of the Plan was as follows:

> "Pensions being paid to persons previously retired under this Act shall be adjusted by applying the appropriate foregoing percentage to the salaries for positions corresponding to those in which they were employed immediately prior to their retirement . . ."

6. The pension plan booklet distributed to all participants explained this calculation method as follows:

> "If, after your retirement, the salary for the position you held immediately prior to your retirement is changed, the amount of your pension will be adjusted accordingly."

7. Just prior to plaintiff's retirement, the Plan was amended by defendants, effective January 1, 1977, so as to gradually eliminate this provision over an eight year period, beginning January 1, 1979; defendants thereafter applied this amendment to all retirees.

8. The amendment above described violated the provisions of 29 U.S.C. 1054(g) in that it decreased the accrued benefits of plaintiff and violated the terms of his employment for over 20 years.

9. In Action No. CV 81 6076 AAH (Mx), in the United States District Court for the Central District of California, a member of defendant Plan who had retired prior to January 1, 1977, sought declaratory relief in a class action suit to prevent application of the amendment to himself and all those similarly situated. On July 15, 1983, the District Court ruled that the amendment of which plaintiff here complains was in violation of ERISA (*Shaw* v. *International Association of Machinists and Aerospace Workers Pension Plan*, 563 F. Supp. 653). A copy of the order confirming actions to be taken by the defendants is attached hereto as Exhibit A. The United States Court of Appeals for the Ninth Circuit affirmed this judgment on January 11, 1985, (50 F.2d 1458) and certiorari was denied by the United States Supreme Court on June 3, 1985 (105 S.Ct. 2678). On remand to the District Court, it was stipulated between plaintiffs and defendants, effective January 3, 1986, that judgment in the case would apply only to individuals in the class which had retired prior to January 1, 1977, thus omitting plaintiff who had retired six months later on July 1, 1977.

10. The adoption of the amendment to the Pension Plan above described was a breach of the fiduciary duty defendants owed to plaintiff in that the adoption of the amendment was not for the sole and exclusive benefit of the participants and beneficiaries, but rather served solely the purposes of the sponsoring entity; such amendment is a breach of the agreement between defendants and plaintiff, and the amendment is therefore arbitrary and capricious and voidable by this court.

11. Plaintiff has made demand of defendants that they pay plaintiff the benefits due him as if the amendment effective January 1, 1977, had not been adopted, and as per the judgment in *Shaw*, supra, but defendants have refused and continue to refuse to pay plaintiff such benefits.

12. As a direct and proximate result of the application of this amendment to plaintiff, plaintiff has suffered and continues to suffer a substantial financial loss, in an amount which thus far exceeds $80,000. Plaintiff will seek leave of this Court to amend this Complaint to state a precise damage figure when the same can be ascertained.

13. As a further direct and proximate result of the application of the aforesaid amendment, plaintiffs have been required to incur attorney's fees in pursuing this action. Plaintiffs will seek leave to amend this Complaint when said amount has been ascertained.

WHEREFORE, plaintiffs respectfully request that this Court:

1. Enter a judgment declaring that the amendment of the Plan, effective January 1, 1977, and the subsequent practices of the defendants with respect to plaintiff's pension benefits are in violation of the laws of the United States, and are arbitrary, capricious and in breach of defendants' fiduciary duties to plaintiff;

2. Issue its declaratory judgment ordering defendants:

(a) To pay to plaintiff the amount of money in pension benefits he would have received without application of the said amendment, together with interest thereon from the dates on which such benefits would have accrued but for the amendment;

(b) To reform the Plan so that the aforesaid amendment is not applicable to participants such as plaintiff who worked for 20 years prior to January 1, 1977, in reliance that their pension benefits would be those prior to the amendment effective January 1, 1977;

3. Award plaintiff punitive damages in a sum commensurate with defendants' financial circumstances and the willfull nature of defendants' breach of their fiduciary duties to plaintiff.

4. Retain jurisdiction over this action and order defendants to report periodically on defendants' progress in compliance with the terms of this Court's order;

5. Award plaintiff the costs of this action together with such attorney's fees as may be appropriate under 29 U.S.C. 1132(g); and

6. Grant such other and further relief as may be proper.

Dated: May 9, 1986

BROBECK, PHLEGER & HARRISON

By /s/ Paul N. McCloskey, Jr.
PAUL N. MCCLOSKEY, JR.
Attorneys for Plaintiff

STATUTORY APPENDIX

ERISA Section 204(g):

(g)(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in Section 302(c)(8) or 4281.

ERISA Section 302(c)(8):

(8) For purposes of this part, any amendment applying to a plan year which—

(A) is adopted after the close of such plan year but no later than 2½ months after the close of the plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and

(C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 303(b)) and that

waiver under section 303(a) is unavailable or inadequate.

ERISA Section 413:

(a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation * * * except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

ERISA Section 502(a):

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409;

(3) by a participant, beneficiary, or fiduciary,

(A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c);

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (i).